

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST

VCAT REFERENCE NO. OC117/2018

CATCHWORDS

Proposed installation of two windows in external wall of flats – location of boundary between property of lot owner and property of owners corporation – permissions required to install windows – *Owners Corporations Act 2006*, s 52, *Subdivision Act 1988* s 46, Sch 2, cls 2,5, *Subdivision (Registrar's Requirements) Regulations 2011*, regs 4, 10 and 31.

APPLICANT	Ignatius Ralph Taliana
RESPONDENT	Owners Corporation No. 5384
WHERE HELD	Melbourne
BEFORE	J. Smithers, Senior Member
HEARING TYPE	Hearing
DATE OF HEARING	21 June 2018
DATE OF ORDER	1 August 2018
CITATION	Taliana v Owners Corporation No. 5384 (Owners Corporation) [2018] VCAT 1222

ORDER

1. The application for orders that Owners Corporation No. 5384 must allow Mr Taliana to install the two proposed windows without obtaining the consent of the Owners Corporation, is dismissed.

J. Smithers
Senior Member

APPEARANCES:

For Applicant

Mr Taliana in person.

For Respondents

Mr Nikakis, Ace Body Corporate Management

REASONS

Introduction

- 1 Mr Taliana is the owner of unit 5, 31 Dover Road Williamstown. This is a two storey block of nine flats built around 1975. The flats are affected by Owners Corporation RP 5384 (the OC).¹ The flats have a side-on orientation to the street. There are four ground floor flats all aligned one behind the other with four flats on the level above, each directly above the one below. There is also a ninth (first floor level) flat at the back. And there are nine accessory units, being parking spaces. Mr Taliana's flat, unit 5, is at the front, on the first level. Apart from the balcony, the entire eastern wall of the flats consists of a brick wall. This forms Mr Taliana's eastern wall at first floor level, and the east wall of unit 1 below.
- 2 Mr Taliana wishes to install two windows, each 1.8 m wide and 600 mm high, in what is currently the uninterrupted east brick wall. He said he obtained a planning permit for this in December 2015.
- 3 He then approached the OC. The manager of the OC, Ace Body Corporate Management, arranged for Mr Taliana's proposal to be put to a vote in February 2016. The OC proceeded on the basis that a special resolution was required to permit Mr Taliana to install the two windows. The result was that less than 75% of unit holders voted in favour of the proposal: 2 voted in favour, 4 against and 3 did not respond. So no special resolution was achieved.
- 4 Now, Mr Taliana has commenced this application seeking orders to the effect that the OC must allow him to install the windows without a special resolution, or indeed without any consent being obtained from the OC at all. The applicant represented himself, and the OC was represented by Mr Con Nikakis of Ace Body Corporate Management.
- 5 The parties only made brief submissions at the hearing. These related to the question of whether the external wall at the front (eastern end) of the units at the upper level is part of Mr Taliana's lot, not part of the common property.
- 6 Mr Nikakis inclined to the view, sympathetically to Mr Taliana's position, that the exterior of the wall is not part of the common property. However, neither party put their position with any degree of certainty.
- 7 This application raises two issues. First, is the whole of the eastern wall of Mr Taliana's flat his property, or is the exterior part of it common property? Second, what are the implications of that in so far as obtaining permission to install the windows is concerned?

¹ The body corporate created by registration of the plan in 1975 has now become an owners corporation – *Subdivision Act 1988*, Schedule 2, cl 2(c) and *Owners Corporations Act 2006*, Schedule 2, cl 4.

Who owns the exterior of the east facing brick wall?

- 8 In my view, it is clear the exterior wall is common property. This is because the boundary between Mr Taliana's unit and the common property is the 'median' of that wall. The reasons for this conclusion are as follows.
- 9 The units were created by way of a Plan of Strata Subdivision under the *Strata Titles Act 1967*. The plan was registered on 3 February 1975. The 'Legend' on page 2 of that plan describes in detail where the lower boundary of each unit is located (within the floor), and where the upper boundary is located (within the ceiling). But it does not specify where the side boundaries are located. At point 4, the Legend states, 'The common property is all the land in the parcel except the land in units 1 to 18 (both inclusive)'.
- 10 This plan is now to be interpreted in accordance with the *Subdivision Act 1988* (the Subdivision Act) and the *Subdivision (Registrar's Requirements) Regulations 2011* (the Regulations).
- 11 Section 46 of the Subdivision Act says that 'Schedule 2 [of the Subdivision Act] has effect with respect to registered plans of strata subdivision... within the meaning of the *Strata Titles Act 1967*...'
- 12 Clause 2(1)(a) of Schedule 2 has the effect that from the date the Subdivision Act came into force, it applies to strata plans under the *Strata Titles Act 1967*, rather than the provisions of the old 1967 Act.
- 13 Clause 5 of Schedule 2 relevantly says that:
- Unless the plan otherwise provides, if the whole all or part of the boundary of a lot with another lot or with common property on a strata... plan... lies along or within a structure that is a wall, fence, floor or ceiling, the boundary is the median of the structure.
- 14 The same conclusion follows from Regulation 31(3) of the Regulations. This says:
- On a strata plan the location of any common boundary between the unit and another unit or a unit and common property is the median of any wall, fence, floor or ceiling unless the plan by legend or otherwise indicates that the boundary is in another position.
- 15 And Regulation 4 makes it clear that Regulation 31 applies to this Plan of Strata Subdivision, since it relevantly defines 'strata plan' as a plan of strata subdivision registered before 30 October 1989.
- 16 Finally, Regulation 10(4)(c) confirms that the median of a brick veneer wall is the small void between the bricks and the timber studs to which the internal plaster is affixed. It relevantly states:
- Unless otherwise specified on the plan, the location of any building boundary defined as ...
- (c) **Median (wall, window, door, balustrade)** lies along the midpoint between exposed surfaces of any wall, window, door and balustrade of the relevant part of a building....

There is also a cross-section diagram in Regulation 10(4)(b) illustrating this.

- 17 The consequence for Mr Taliana is that the bricks comprising the outer layer of his wall are in fact, common property.

What permissions are required to install the windows?

- 18 As noted, the OC Manager proceeded on the basis that a special resolution was required for the installation of the windows. In my view, only an ordinary resolution is required, for the following reasons.
- 19 I am not certain on what basis it was concluded that a special resolution was required. If it was on the basis that the proposal involved a ‘significant alteration to the use or appearance of the common property’ under s 52 of the *Owners Corporations Act 2006*, then that was mistaken, since s 52 only applies where it is the OC which proposes to make a significant alteration to the use or appearance of common property (*Martin & Ors v Owners Corporation 431576* [2009] VCAT 2699). Here, by contrast, it is the lot owner, Mr Taliana, who wishes to make the alteration.
- 20 I was told that the Model Rules (set out in Schedule 2 to the Owners Corporations Regulations 2007) apply without modification to the OC.
- 21 Model Rule 3.3 relevantly provides:
- (1) An owner or occupier of a lot must not damage or alter the common property without the written approval of the owners corporation.
 - (2) An owner or occupier of a lot must not damage or alter a structure that forms part of the common property without the written approval of the owners corporation.
 - (3) An approval under sub rule (1) or (2) may state a period for which the approval is granted, and may specify the works and conditions to which the approval the subject.
- 22 Model Rule 3.3 does not require a special resolution for works to be done affecting common property, only an ordinary resolution. The likely rationale for this was explained by Senior Member Vassie in the *Martin* case: no expenditure of OC funds is required where the works are not being done by the OC.
- 23 So all Mr Taliana requires is an ordinary resolution approving the installation of windows. While it is possible Mr Talia may be able to achieve this in the future, that was not the outcome of the vote taken in February 2016. Accordingly, the application is dismissed.

J. Smithers
Senior Member